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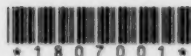
**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises**

### **Note by the Secretariat**

The present report, prepared pursuant to Council resolutions 17/4 and 35/7, examines the duty of States to protect against human rights abuses by business enterprises to whom they provide support for trade and investment promotion. It explores how States can incentivize business respect for human rights in this context, including through withdrawal of trade and investment support in situations where businesses fail to meet their corporate responsibility to respect human rights.

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## I. Introduction

### A. Background, focus and rationale of the report

1. The starting point for the present discussion is the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Since their unanimous endorsement by the Human Rights Council in 2011, the Guiding Principles have become the authoritative global reference for preventing and addressing adverse human rights impacts arising from business-related activity.
2. In an earlier report, the Working Group examined how States — pursuant to pillar I of the Guiding Principles, the State duty to protect — should lead by example as economic actors by ensuring that State-owned enterprises respect human rights (A/HRC/32/45). The present report focuses on another area where States play an important role as economic actors: trade promotion, also referred to as economic or commercial diplomacy.
3. States act as gatekeepers when they provide much needed support to businesses by providing trade finance and advisory services aimed at expanding export opportunities. As gatekeepers, States can use their leverage to promote a race to the top by setting out clearly the expectation that businesses respect human rights as a precondition for receiving government support for export activities. States can also promote responsible imports by restricting the flow of goods in supply chains that involve serious human rights abuses.
4. Why should States focus on human rights and the role of business in relation to human rights in the context of trade and investment promotion? The short answer is that global supply chains in cross-border trade present significant human rights risks and challenges. In the export context, sellers of products in global markets need to ensure that the products they are selling will not cause, contribute or be directly linked to adverse human rights impacts. In the context of imports, a buyer of goods in the global marketplace also needs to ensure that the goods it is purchasing were not produced or manufactured in a way that caused, contributed to or was directly linked to adverse human rights impacts, such as forced labour or human trafficking.
5. While there is a much larger connection between the global trading system and adverse human rights impacts, the present report focuses solely on the role States play as service providers and public financiers, insurers and guarantors to companies seeking support for export/import transactions. The report does not address issues of global trade rules or the role of trade treaties and multilateral trade organizations with respect to adverse business-related human rights impacts.
6. In the present report, the Working Group unpacks Guiding Principle 4, which sets forth the expectation that States should take additional steps to protect against human rights abuses by business enterprises that receive substantial support and services from State agencies including, where appropriate, by requiring human rights due diligence. The commentary to Guiding Principle 4 indicates that if State agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk and may add to the human rights challenges faced by the recipient State.
7. Furthermore, in general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights calls on States to revise relevant tax codes, public procurement contracts and export credits, and other forms of State support, privileges and advantages in the case of human rights violations, thus aligning business incentives with human rights responsibilities. In 2017, the leaders of the Group of 20 also recognized the connection between human rights and trade when they referred to the Guiding Principles in a call for more sustainable supply chains.<sup>1</sup>

<sup>1</sup> See "G20 Leaders' declaration: shaping an interconnected world" (July 2017).

8. For the present report, the Working Group solicited input from all stakeholders, including States, and from the Export Credit Group of the Organization for Economic Cooperation and Development (OECD) and its separate working group of environmental and social practitioners, which includes representatives of non-OECD States as well. Consultations also included an open consultation in Geneva in September 2017 and a dedicated session at the 2017 Forum on Business and Human Rights.<sup>2</sup>

## **B. Definition and objectives**

9. States provide a wide range of services for businesses engaged in trade and export. Those services include selecting companies for participation in trade missions, export promotion and marketing for companies through trade and commercial officers in embassies overseas, advocacy by senior government officials of companies who are bidding on major overseas projects, political risk insurance, guarantees and support at major trade shows. The present report refers to such trade promotion activities by public actors as “commercial” or “economic” diplomacy.

10. There are innovative models being deployed in some States, but the promise of Guiding Principle 4 remains mostly unfulfilled. In the report, the Working Group explores opportunities for States to take the lead and promote greater respect for human rights. As noted in the report, in related areas such as combating corruption and business integrity, models exist in trade and investment promotion that could be adapted to encompass business respect for human rights. While anti-corruption commitments may be linked to State commitments via international treaties (for example, the United Nations Convention against Corruption), the principle is still a useful one: that by embedding a requirement into a contract between trade promotion agencies and companies, if there is a breach of such an agreement, that would be a basis for further action, such as the withdrawal of future trade support or other government services.

11. The first objective of the report is to understand how States can use their leverage with respect to trade and investment promotion and the export/import process to also promote greater corporate respect for human rights. The second objective is to explore where, pursuant to the State duty to protect against business-related human rights impacts, there are opportunities for States to require businesses with whom they interact, to align their activities with the Guiding Principles through the requirements of human rights due diligence and addressing issues relating to access to effective remedy.

## **II. Trade and export promotion**

### **A. Respect for human rights as a requirement and condition of State support**

12. Many States provide ongoing advisory services for companies seeking to export their goods into foreign markets. Such services often reach small and medium-sized enterprises, which may lack the in-house expertise and financial resources for individual market research. To date, few States have asked businesses to demonstrate a commitment to the Guiding Principles as a prerequisite for receiving services from State export promotion entities. For those who have asked for human rights commitments, there have been no studies to examine how well such commitments are monitored and implemented by States.

13. Canada has asked for specific commitments from the extractive sector. As part of the country’s enhanced corporate social responsibility strategy, Canadian extractive companies are expected to align their operations overseas with Canadian corporate social responsibility guidelines and will be eligible for enhanced economic diplomacy only after

<sup>2</sup> The following States responded to the Working Group’s survey: Costa Rica, Denmark, Finland, France, Germany, Italy, Mexico, Mongolia, Namibia, Netherlands, Philippines, Portugal, Russian Federation and United States of America.

doing so. Those commitments include adherence to the Guiding Principles and to the OECD Guidelines for Multinational Enterprises.

14. Chile notes in its National Action Plan on business and human rights that it intends to establish, if relevant, requirements about sustainability and respect for human rights, as criteria to choose business enterprises to participate in programmes to promote exports and corporate activities.<sup>3</sup> The Ministry of Commerce, Industry and Tourism in Colombia intends to link access to trade and investment support to business commitments to respect human rights.<sup>4</sup> The Danish Ministry of Foreign Affairs requires Danish companies with which it interacts to comply with a code of conduct. That includes requirements not to practise discrimination, not to use child labour and to recognize workers' rights.<sup>5</sup>

15. The South African Department of Trade and Industry has developed guidelines for good business practice by South African companies operating in the rest of Africa, setting out the expectation that companies will respect human rights and adhere to the principles of the United Nations Global Compact.<sup>6</sup> While the guidelines are voluntary, they demonstrate how a State can tie responsible business conduct to an export promotion and trade agenda.

16. Asking companies to demonstrate a commitment to ethical standards is not new. States have often required businesses to make anti-corruption pledges as a condition of trade-related support. As part of the 2017 G20 process, the Business-20 (B20) issued a policy paper on responsible business conduct and combating corruption, noting that: "An adequate and robust compliance program should also be a requirement for officially supported export credits and trade insurances."<sup>7</sup>

17. For example, the Kenya Export Promotion Council has an anti-corruption policy which includes enhanced due diligence of its potential local export partners.<sup>8</sup> Austrade, Australia's trade promotion service requires companies to certify ethical business practices as part of their terms of service: "Your organization must be committed to maintaining business ethics and legal obligations including anti-bribery laws in Australia and overseas."<sup>9</sup> Such processes could be expanded to require applicants to also demonstrate commitments to the Guiding Principles and the OECD Guidelines alongside an anti-bribery or business ethics pledge.

## B. Trade missions

18. Trade missions are an important tool in export promotion and commercial diplomacy. They allow potential exporters to learn how business is conducted in a foreign market and to find potential overseas buyers. They are often facilitated by a State export promotion agency or department and/or with the assistance of trade or commercial officers located in embassies in the country that the delegation will visit. High-level government officials may also head a trade mission delegation.

19. The Council of Europe recommendation on human rights and business discusses trade missions. It notes that "Member States should, when business enterprises ... are represented in a trade mission to member States and third countries, address and discuss

<sup>3</sup> See [www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx](http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx).

<sup>4</sup> See "National Action Plan on human rights and business", available at [www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx](http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx).

<sup>5</sup> Danish submission in response to the call for stakeholder inputs.

<sup>6</sup> See, for example, [www.rmi.org.za/guidelines-for-good-business-practice-by-south-african-companies-operating-in-the-rest-of-africa/](http://www.rmi.org.za/guidelines-for-good-business-practice-by-south-african-companies-operating-in-the-rest-of-africa/).

<sup>7</sup> See B20 Cross-thematic Group on Business Conduct and Anti-corruption, "Promoting integrity by creating opportunities for responsible businesses".

<sup>8</sup> Kenya Export Promotion Council, "Revised anti-corruption policy" (2011).

<sup>9</sup> See [www.austrade.gov.au/Australian/How-Austrade-can-help/Trade-services/Opportunities-terms-and-conditions](http://www.austrade.gov.au/Australian/How-Austrade-can-help/Trade-services/Opportunities-terms-and-conditions).

possible adverse effects future operations might have on the human rights situation in those countries and require participating companies to respect the UN Guiding Principles ...".<sup>10</sup>

20. Only a handful of States have sought to integrate human rights issues into official trade missions. The United Kingdom of Great Britain and Northern Ireland did so in relation to Myanmar. Finland involved human rights civil society organizations in a joint trade mission led by its trade and development ministers to the United Republic of Tanzania and Zambia.<sup>11</sup> In its recent National Action Plan, Ireland committed to advising companies who will participate in trade missions about human rights in destination countries and providing information about its laws prohibiting foreign bribery.<sup>12</sup> Belgium will also ensure that the trade missions it organizes include awareness-raising regarding respect for human rights.<sup>13</sup>

21. The Netherlands now has a routine requirement for all trade missions to brief businesses on human rights issues. It takes one more step in selecting mission participants. Dutch companies that wish to participate in government-sponsored trade missions must demonstrate a commitment to the OECD Guidelines for Multinational Enterprises, with an emphasis on human rights risk analysis. The Government verifies to what extent the business is aware of the Guidelines and, shortly before departing on a trade mission, the business is provided with training on standards of responsible business conduct.<sup>14</sup>

22. Trade missions provide unique opportunities for States to raise awareness of business and human rights dilemmas related to the market they are visiting.<sup>15</sup> For example, in countries where attacks on human rights defenders are a significant risk, that should be raised in the context of trade missions. Civil society organizations have suggested to the Working Group that this may be a particularly useful avenue for addressing the risks faced by defenders when there is a link to businesses receiving trade or investment support from their home Government.<sup>16</sup>

23. States already vet companies that participate in foreign trade missions to ensure they meet certain criteria. The United States of America, for example, screens applicants for trade mission for bribery concerns and also asks them to sign a no-bribery pledge as a precondition to participation.<sup>17</sup> States should consider developing similar procedures whereby companies are asked to demonstrate a commitment to the Guiding Principles and responsible business conduct as a precondition to participation in a mission. The Dutch example appears to be the only model that uses vetting for human rights as a precondition for mission selection.

### C. Trade advocacy

24. Trade advocacy support is characterized as those activities for which embassy personnel and high-ranking government officials will advocate on behalf of domestic companies with foreign public officials. The purpose of such advocacy is to highlight the strengths of a national company when it is competing against companies from other countries for a government contract in a foreign market.

<sup>10</sup> Council of Europe, "Human rights and business" (recommendation CM/Rec(2016)3 of the Council of Ministers).

<sup>11</sup> Institute for Human Rights and Business, "State of play. Human rights in the political economy of States: avenues for application" (March 2014).

<sup>12</sup> See "National Plan on business and human rights 2017–2020", available from <https://globalnaps.org/country/ireland/>.

<sup>13</sup> Belgian National Action Plan available from <https://globalnaps.org/country/belgium/>.

<sup>14</sup> OECD, "Responsible business conduct and economic diplomacy tools" (June 2017).

<sup>15</sup> Institute for Human Rights and Business, "State of play".

<sup>16</sup> See consultation summary note on scaling up initiatives to protect human rights defenders, (November 2017), available from [www.ohchr.org/Documents/Issues/Business/ScalingUpInitiativesProtectHRDefenders\\_30Nov2017.pdf](http://www.ohchr.org/Documents/Issues/Business/ScalingUpInitiativesProtectHRDefenders_30Nov2017.pdf).

<sup>17</sup> See, for example, United States Government Publishing Office conditions for trade missions, available from [www.gpo.gov/fdsys/granule/FR-2017-08-01/2017-16082](http://www.gpo.gov/fdsys/granule/FR-2017-08-01/2017-16082).

25. Having a senior minister advocate for a company is a substantial benefit. States should only advocate for companies that respect human rights and screen requests to make that determination.
26. The Working Group has not received any information about States requiring companies for whom they advocate to demonstrate respect for human rights or further adoption of the Guiding Principles. As noted above, what some States have done is to require companies to make commitments focused on integrity and combating corruption.
27. In Canada trade advocacy may include providing support to a company in interactions with foreign public officials and in certain circumstances in the public sphere generally. This may also include making representations on behalf of the company to foreign public officials, accompanying clients to meetings with foreign public officials, or supporting and/or participating in, events tailored to a particular company. The Government of Canada requires companies seeking such support from its Trade Commissioner Service to sign an integrity declaration. A company must attest that it understands the ethical expectations of Canada and has not been "charged, convicted or sanctioned for bribery or corruption, and will not engage in such illegal activities".<sup>18</sup> If a company has been sanctioned for bribery, it must disclose past misconduct, which may affect the support it receives from the Government of Canada.
28. The United States International Trade Administration also has an advocacy centre. A company interested in receiving United States advocacy assistance must first file an advocacy questionnaire and anti-bribery agreement with the advocacy centre. The anti-bribery agreement requires a company to certify that neither the company nor its affiliates will engage in bribery of foreign officials.<sup>19</sup>

#### **D. Training and guidance for trade and embassy personnel and for businesses**

29. OECD has noted in relation to the promotion of responsible business conduct that "for some countries, the NAPs have provided an impetus to step up specific training and capacity building of diplomatic personnel".<sup>20</sup>
30. There is still room for greater training and education of trade officers within national export promotion agencies and of those officials working within embassies or missions in host States.<sup>21</sup> However, at present this need is not matched by relevant guidance.
31. Existing guidance (for example from the International Trade Centre) mentions the need to train trade representatives on issues relating to combating corruption and fleetingly mentions social compliance and corporate social responsibility as other issues of which trade representatives should be aware, but does not elaborate further on the subject. A trade promotion officer may not feel comfortable providing guidance to companies on human rights risks. The language of risk mitigation in the Guiding Principles and the framework of human rights due diligence therefore provide a useful framework for speaking about the processes companies need to undertake to respect human rights.
32. Germany intends to provide training on its National Action Plan and the Guiding Principles for trade officers in embassies and consulates. The training will enable trade officers to provide support to German companies that wish to exercise human rights due diligence in the respective host countries. Staff members of German export and investment

<sup>18</sup> See <http://trade commissioner.gc.ca/how-tcs-can-help-comment-sdc-peut-aider.aspx?lang=eng>.

<sup>19</sup> See [https://2016.export.gov/advocacy/eg\\_main\\_092202.asp](https://2016.export.gov/advocacy/eg_main_092202.asp).

<sup>20</sup> See OECD, "Responsible business conduct and economic diplomacy tools."

<sup>21</sup> International Trade Centre, *Entering New Markets. A Guide for Foreign Trade Representatives* (2013).

guarantee agencies are offered classroom training on the Plan and environmental and social specialists act as a helpdesk.<sup>22</sup>

33. In addition to training trade officials, some States are providing tools for their officials as well as for companies.

34. The Belgian National Action Plan briefly mentions that diplomats do not always have the necessary tools or knowledge of human rights and business in particular, to inform and guide companies to ensure that their extraterritorial activities take account of their impact on human rights. As a result, Belgian trade representatives will receive a toolbox to better inform companies that seek to export. The toolbox will include elements on grievance mechanisms enabling the Belgian diplomatic network to better inform businesses and victims of possible business-related abuses about access to remedy in Belgium. The United Kingdom has developed a government business and human rights toolkit, which aims to give guidance to political, economic, commercial and development officers in embassies as to how to promote responsible business conduct by British companies operating overseas.<sup>23</sup>

35. Some training for companies is done via partnerships between States. Sweden has entered into memorandums of understanding with certain countries on corporate social responsibility. For example, there are two memorandums between China and Sweden, including an action plan establishing a centre for corporate social responsibility at the Swedish Embassy in Beijing. Among other activities, the centre provides training for companies.<sup>24</sup> Chile and Sweden signed a memorandum of understanding on corporate social responsibility in 2012. India and China have a partnership agreement to promote trade and investment, which includes a commitment to fostering stronger cooperation between national chambers of commerce and encourages companies in both States to include corporate social responsibility in their corporate development strategies.<sup>25</sup>

36. China has also focused on providing sectoral guidance to its companies. The 2014 guidelines for social responsibility in outbound mining investment produced by the China Chamber of Commerce of Metals, Minerals and Chemical Importers and Exporters call for Chinese mining companies undertaking outbound mining investments, cooperation and trade to strictly observe the Guiding Principles during the entire life-cycle of the mining project and to strengthen responsibility throughout the extractive industries value chain.

37. The increasing number of States that are including training and educational resources on corporate social responsibility and on business and human rights for both trade and embassy personnel and companies operating or trading abroad is a positive step. Training and counselling help to raise awareness of key human rights issues in the private sector. States need to consider how to move such training beyond theory into actual practice. To that extent, training needs to include discussions of real-world dilemmas that occur to enable trade officers to start thinking critically about the advisory role they play with companies. At the same time, training and education is at most a partial step towards States fulfilling their duty under Guiding Principle 4. Few States link providing trade promotion services or benefits, such as participation in a trade mission, to requiring businesses to demonstrate respect for human rights and use of the Guiding Principles.

### III. Role of export credit agencies

38. Export credit is a tool used by Governments to provide trade finance to the private sector. Under an export credit regime, States provide loans and other types of risk cover (for example, insurance) for a domestic exporter's international buyers. Providing financing

<sup>22</sup> National Action Plan. Implementation of the UN Guiding Principles on Business and Human Rights 2016–2020, available from <https://globalnaps.org/country/germany/>.

<sup>23</sup> See OECD, "Responsible business conduct and economic diplomacy tools".

<sup>24</sup> See, for example, <http://csr2.mofcom.gov.cn/article/media/201709/20170902652354.shtml>.

<sup>25</sup> See Five-Year Development Program for Economic and Trade Cooperation between the People's Republic of China and the Republic of India (September 2014).

to potential buyers offers an incentive to foreign buyers to choose an exporter. Insurance and guarantees reduce the risk to the domestic exporter of non-payment by the overseas buyer.

39. In practical terms, export credit agencies provide three main instruments to support domestic exporters (a) insurance, (b) short-, medium- and long-term export credits and (c) guarantees, often coupled with advisory services (market information).<sup>26</sup>

40. There are various models of export credit agency including:

- (a) Those which are State agencies or departments;
- (b) Government-owned State corporations that are operated independently but have government oversight;
- (c) Consortiums of public/private companies that may be controlled by a Government through funding or regulation.<sup>27</sup>

41. Export credit agencies fulfil the basic financial needs of exporters, including pre-export working capital to short-term credit extended to importers; medium- to long-term financing support to overseas importers; and project financing and/or special export structures. Although their share of the overall financing of global trade remains small, they play an increasingly important role.<sup>28</sup> In 2015 alone, export credit agencies in OECD member nations provided \$125 billion in credit, insurance, guarantees and interest support.<sup>29</sup> In the period 2012–2016, public export and investment insurance via export credit agencies totalled between \$920 billion and \$1.031 trillion.<sup>30</sup> They are also a significant source of public financial support for infrastructure projects in developing countries. While their mandate and objectives are commercial, they may produce positive impacts in developing countries, such as the creation of more and better jobs, or the provision of capital and climate finance in or to developing countries.<sup>31</sup>

42. Although export credit agencies support domestic exporters, they do so typically by providing financing for a project sponsor who is purchasing goods as part of a larger infrastructure project or supply chain. A significant number of the projects supported by export credit agencies, particularly large dams, oil pipelines, coal and nuclear power plants, chemical facilities, mining projects and forestry and plantation projects, may lead to adverse human rights impacts (A/66/271). Projects by export credit agencies have been associated with the forced displacement of local populations, poor conditions of work, suppression of the rights to freedom of expression and association and exposure to environmental complaints, as well as the destruction of cultural sites.<sup>32</sup> Export credit agencies have also been scrutinized by civil society for more systemic issues, such as the nature of the projects and industries they finance (for example, the arms trade) or their linkage to sovereign debt in developing countries.<sup>33</sup>

<sup>26</sup> See Edna Shōne, Sustainable ECA business — an irreversible global trend, *Global Policy Journal* blog (February 2015).

<sup>27</sup> See Karyn Keenan, "Export credit agencies and the international law of human rights", Halifax Initiative (2008). Although export credit agencies take various organizational forms, they are usually backed by a Government and operate in accordance with a government mandate.

<sup>28</sup> Both Ends, "Balancing risks: what export credit agencies can do for sustainable development" (January 2007).

<sup>29</sup> See <https://globalmaps.org/issue/export-credit/>.

<sup>30</sup> Berne Union aggregate statistics, 2016 year end, available from [www.berneunion.org/DataReports](http://www.berneunion.org/DataReports).

<sup>31</sup> See Trinomics, "Pilot study of private finance mobilised by Denmark for climate action in developing countries" (2015).

<sup>32</sup> See Jubilee Australia, "Risky business. Shining a light on Australia's export credit agency" (December 2009); ECA Watch, "Race to the bottom, take II" (September 2003); and Robert McCorquodale and Penelope Simons, "Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law", *Modern Law Review*, vol. 70, No. 4 (July 2007).

<sup>33</sup> See European Network against Arms Trade, "European export credit agencies and the financing of arms trade" (2007) and European Network on Debt and Development, "Exporting goods or exporting debts? Export credit agencies and the roots of developing country debt" (December 2011).

43. Civil society groups have raised and continue to raise concerns about specific projects financed by export credit agencies.<sup>34</sup> The case of the Ilisu dam is often cited as an example of a project which has had significant human rights impacts, such as population resettlement and the destruction of cultural heritage. In 2005, a consortium applied for export credit guarantees in Austria, Germany and Switzerland for the construction of a hydroelectric dam. The respective export credit agencies offered their support based on 153 environmental and social commitments but the Governments of Austria, Germany and Switzerland ultimately withdrew funding for the dam project. That followed independent expert assessments, which concluded that the dam project was not meeting the agreed standards, including in relation to social and environmental impacts. The lesson drawn from the Ilisu project was that export credit agencies needed to put in place due diligence processes and project monitoring.<sup>35</sup> More recently, in at least one instance, a national contact point has noted that an agency may not have fully used its leverage or engaged in the proper level of human rights due diligence as required under the OECD Guidelines.<sup>36</sup>

44. Other human rights impacts that arise outside of a traditional project finance context may relate to the nature of goods being exported in a global supply chain. For example, in information and communications technology an exporter may sell goods to a customer (State or non-State) that will use the equipment for surveillance, leading to adverse impacts on a person's right to life, to arbitrary detention, torture and potential violations of other civil and political rights.<sup>37</sup>

45. Given the connection between export credits and finance linked to adverse human rights impacts, are there requirements in place that businesses who receive support in the form of export credit respect human rights, conduct due diligence and align their operations with the Guiding Principles? The answer is mixed, with only a subset of public or publicly supervised/funded export credit agencies currently requiring some form of human rights due diligence, and then only for a subset of transactions, typically with a term of two years or longer.

46. One of the largest gaps in terms of export credit and alignment with the Guiding Principles is that many public export credit agencies have no explicit focus on human rights due diligence as part of their operations, either for their own decision-making or as a requirement for their clients.

47. The largest export credit membership organization is the Berne Union, which is a network of private and public entities. Its 85 members include government-backed export credit agencies, private credit and political risk insurers and multilateral institutions which provide insurance products, guarantees and, in some cases, direct financing in support of cross-border trade.<sup>38</sup> The insurance products its members provide offer protection for exporting companies, investors and financial institutions against losses as a result of buyer default.

48. At present, the Berne Union has no explicit mandate to address human rights or social impacts as part of its activities, although its operating principles do refer to

<sup>34</sup> See Export Credit Watch list of reports focusing on human rights concerns surrounding projects financed by public export credit agencies, available from [www.eca-watch.org/ecas/export-credit-agencies](http://www.eca-watch.org/ecas/export-credit-agencies); Amnesty International, "A history of neglect: UK export finance and human rights" (June 2013); Halifax Initiative and others, "Export credit agencies and human rights: failure to protect" (2015).

<sup>35</sup> See Michael M. Cernea, "Population displacement and export credit", Brookings Institution (December 2011). See also Christine Eberlein and others, "The Ilisu dam in Turkey and the role of export credit agencies and NGO networks", *Water Alternatives*, vol. 3, No. 2 (June 2010).

<sup>36</sup> See [www.oecdguidelines.nl/latest/news/2016/11/30/final-statement-both-ends-associacao-forum-suape-vs-atradius-dutch-state-business](http://www.oecdguidelines.nl/latest/news/2016/11/30/final-statement-both-ends-associacao-forum-suape-vs-atradius-dutch-state-business).

<sup>37</sup> Institute for Human Rights and Business, "Telecommunications and human rights: an export credit perspective" (February 2017).

<sup>38</sup> See [www.berneunion.org/Members](http://www.berneunion.org/Members).

sustainable growth, respect for the environment and operation with high ethical values.<sup>39</sup> Within the Union, there is a committee of export credit agencies from emerging markets known as the Prague Club Committee. The majority of members are from smaller markets in Eastern and Central Europe, the Middle East, Central Asia and Africa.

49. In 2012, the United States and China agreed to discuss a set of new global guidelines on export credits through a new international working group on export credits. The International Working Group is led by China, Brazil, the United States and the European Union as rotating chairs. It currently has 18 participants, including South Africa and the Russian Federation. India is an observer in the process.<sup>40</sup> Neither environmental nor social impacts of export credit agency activities are currently on the agenda of the Working Group.

50. Brazil, China, India, the Russian Federation and South Africa currently meet to discuss export credit policies in the BRICS Forum.<sup>41</sup> The principles of the Forum include a commitment to supporting sustainable development, strong, balanced and inclusive growth, financial stability, and a balanced combination of measures ensuring social and economic development and protection of the environment, providing an opening for a discussion of human rights. At present, the priority areas of cooperation do not include social risks or human rights.

51. OECD is currently the main organization that has incorporated human rights into export credit decision-making. The OECD Working Party on Export Credits and Credit Guarantees (Export Credit Group) was established in 1963 to carry forward the work of OECD on export credits, including working out common guiding principles, such as on environmental and social issues. OECD has developed recommendations for export credit agencies with respect to environmental and social due diligence, which are intended to guide the work of the official export credit agencies of member States.

52. The Export Credit Group currently has 33 Members. Chile and Iceland do not participate in the work of the Group as they do not have official support programmes in place. Non-members such as Brazil, Romania and the Russian Federation regularly attend Group events as invitees.<sup>42</sup> There is a separate export credit arrangement, whereby a group of OECD member and non-member States meet to develop common practices focusing on price and terms of credit to ensure a level playing field.<sup>43</sup>

53. The Export Credits Group has negotiated several successive OECD instruments (the Common Approaches) designed to provide a framework for export credit agencies when addressing the potential environmental and social impacts of projects. The two most relevant documents are the 2012 and 2016 revisions of the Common Approaches.<sup>44</sup> In undertaking work on environmental and social issues, the Group has been assisted, since 2004, by its practitioners' group, consisting of the environmental and/or social experts from export credit agencies who are responsible for undertaking due diligence and monitoring of projects. The practitioners meet separately from the Export Credits Group several times a year to discuss implementation of the Common Approaches.

54. The 2012 recommendation was the first instrument to mention human rights reflecting the adoption of the Guiding Principles, which were referenced in its preamble, asserting that "social impacts" encompassed relevant adverse project-related human rights impacts and that such impacts included forced labour, child labour and life-threatening

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<sup>39</sup> See Berne Union value statement, available at [www.sid.si/sites/www.sid.si/files/documents/splosni-dokumenti/berne\\_union\\_value\\_statement\\_2004.pdf](http://www.sid.si/sites/www.sid.si/files/documents/splosni-dokumenti/berne_union_value_statement_2004.pdf). Berne Union members discuss environmental and social issues but have no publicly available guidelines or programmes.

<sup>40</sup> See <http://capexil.org/background-note-iwg-on-export-credit/>.

<sup>41</sup> See [brics.itamaraty.gov.br/images/pdf/BRICSMOU.doc](http://brics.itamaraty.gov.br/images/pdf/BRICSMOU.doc)

<sup>42</sup> Information provided by the OECD Export Credit Group secretariat.

<sup>43</sup> The Participants Group is not an OECD body and does not, therefore report to the OECD Council, however it meets under the auspices of OECD with support from the OECD export credits secretariat.

<sup>44</sup> See OECD Council recommendation on common approaches for officially supported export credits and environmental and social due diligence, adopted by the Council in June 2012 and the revision adopted in April 2016.

occupational health and safety situations. In the 2012 recommendation members were asked to consider the issue of human rights, with the aim of reviewing how project-related human rights impacts might be further addressed in future. There were, however, no specific recommendations on human rights due diligence.

55. In 2016, the OECD Council approved a revised version of the Common Approaches. In that document, there is an explicit statement to the effect that export credit agencies should now screen all applications covered by the Common Approaches, according to whether or not there might be a strong likelihood of severe project-related human rights impacts occurring.<sup>45</sup> Participating export credit agencies should then assess the potential environmental and/or social risks in applications relating to all existing operations for which their share is equal to or above SDR 10 million and all existing operations and projects, irrespective of their share, where screening has identified a strong likelihood of severe project-related human rights impacts occurring.

56. In screening an application, export credit agencies will then place the project into category A, B or C, which imply a requirement for varying levels of environmental and social review, including environmental and social impact assessments. In addition, where screening has identified a strong likelihood of severe project-related human rights impacts occurring, the environmental and social review of a project may need to be complemented by specific human rights due diligence.

57. A footnote to the 2016 recommendation provides examples of severe project-related impacts. For example, impacts that are particularly grave in nature (threats to life, child or forced labour and human trafficking), widespread in scope (large-scale resettlement and working conditions across a sector), cannot be remediated (torture, loss of health and destruction of the land of indigenous peoples) or are related to the operating context of the project in question (conflict and post-conflict situations).

58. Specific methods for human rights due diligence are left to the discretion of individual export credit agencies. Moreover, the due diligence approach described above is only applicable to applications covered by the Common Approaches and therefore excludes transactions, such as short-term credit under two years, working capital, support for bonds and transactions that may be considered outside the current definition of "project", such as mobile equipment (for example, ships) and communications equipment. The 2016 recommendation allows for projects backed by an export credit agency to be benchmarked against the World Bank environmental and social safeguard policies or the International Finance Corporation (IFC) Environmental and Social Performance Standards, depending on the financial structure of the transactions. Some export credit agencies have decided to benchmark all projects against the IFC Performance Standards, but again practice is variable.

59. For export credit agencies, the OECD Guidelines should also serve as a key tool alongside the Guiding Principles. The Guidelines state that the ownership structure of a multinational enterprise (whether public or private) does not change their applicability. The Guidelines, which incorporate a human rights chapter aligned with the Guiding Principles, require export credit agencies, which are business entities themselves, to engage in appropriate human rights due diligence with respect to their business relationships and to the extent that they are representatives of the State or public entities, to use their leverage to require their business partners and clients to do the same.

60. A recent decision by the Dutch National Contact Point clarifies the status of export credit agencies. In June 2015, the national contact point system received a complaint alleging that Dutch export credit agency, Atradius DSB had failed to comply with the OECD Guidelines in the context of its financing of a dredging project in north-eastern Brazil, which had resulted in severe human rights and environmental impacts. The complaint against Atradius stated that it had failed to ensure that the Guiding Principles and the IFC Performance Standards had been effectively applied to the project. In its initial assessment, accepting the complaint of 3 December 2015, the Dutch National Contact Point

<sup>45</sup> Para. 6.

found that Atradius qualified as a multinational enterprise under the Guidelines and concluded that the specific instance merited further consideration.<sup>46</sup>

#### A. Examples of good practices among export credit agencies

61. The environmental and social practitioners group associated with the OECD Export Credit Group include representatives of countries which are not OECD members, such as Brazil, Kazakhstan, the Russian Federation and others. The fact that a wide range of publicly-backed export credit agencies from both member and non-member OECD countries take part in the meetings of the group is a positive step in terms of peer learning and development of good practice. It appears, however that even within the OECD group, export credit agencies are still in the early phases of developing good practice. It is important for them to share their good practices more widely, as evolving public expectations continue to shine a spotlight on the critical role they play in the business and human rights arena.<sup>47</sup>

62. The Norwegian Export Credit Guarantee Agency was one of the first to incorporate human rights due diligence into their screening procedures. The Agency indicates that its environmental and human rights due diligence procedure is based on the OECD Common Approaches and the Guiding Principles.<sup>48</sup> Although the Agency uses the IFC Performance Standards, it states that in order to address any potential gaps in practice, its due diligence process will take into consideration all internationally recognized human rights in a manner that is consistent with the Guiding Principles.<sup>49</sup> The Agency is also unique in describing how it understands and intends to use its leverage to advance respect for human rights in its clients' operations.

63. In the Netherlands, Atradius goes beyond the Common Approaches in conducting human rights due diligence if there is a risk of severe human rights impacts in smaller or shorter-term transactions. It recognizes that the most severe risks to stakeholders may occur in any transaction, unrelated to the duration of cover, the amount of a transaction, or the fact that the policy covers a mobile asset. Atradius was also the first export credit agency to make public a gap analysis, in which it examined its policies and procedures against the Guiding Principles.

64. The Swedish export credit system has developed specific policies and portals that address human rights impacts in the telecommunications sector and make reference to freedom online in documents providing them with annual appropriations.<sup>50</sup> Swedish policies regarding telecommunications provide an interesting model because they focus on a series of impacts that may not be captured by the IFC Performance Standards, which focus on large-scale projects. The development of sector specific guidance is a welcome addition to the export credit area.

65. Even within the OECD Export Credit Group, good practice is still emerging. As a point of comparison, a number of export credit agencies require companies seeking export finance support to make anti-bribery commitments. This includes non-OECD agencies that are parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and have taken this step to implement the relevant recommendation.

<sup>46</sup> Relevant documents are available from [https://www.oecdwatch.org/cases/Case\\_365](https://www.oecdwatch.org/cases/Case_365).

<sup>47</sup> See Chair of the OECD working party on responsible business conduct, Roel Nieuwenkamp, on the role of export credit agencies, available from [www.permanentrepresentations.nl/latest/news/2015/01/12/blog---evolving-expectations-the-role-of-export-credit-agencies-in-promoting-and-exemplifying-responsible-business-practices](http://www.permanentrepresentations.nl/latest/news/2015/01/12/blog---evolving-expectations-the-role-of-export-credit-agencies-in-promoting-and-exemplifying-responsible-business-practices).

<sup>48</sup> Environmental and human rights policy, available from [www.gieck.no/responsible-business-conduct/sustainability-article1796-1075.html](http://www.gieck.no/responsible-business-conduct/sustainability-article1796-1075.html).

<sup>49</sup> Ibid.

<sup>50</sup> Institute for Human Rights and Business, "Telecommunications and human rights: an export credit perspective".

66. According to an OECD study, 44 export credit agencies require exporters and/or applicants to provide an undertaking/declaration that neither they nor anyone acting on their behalf, such as agents, have been engaged in or will engage in bribery in the course of the transaction. They include the Russian Federation, which exceeds standard expectations by using multiple channels of communication regarding the requirement for an anti-bribery undertaking/declaration. The Russian export credit agency obtains an undertaking/declaration through both the application forms and stand-alone documents. Brazil similarly uses stand-alone documents submitted by the exporter or applicant.

## B. Gaps in the OECD Common Approaches

67. As noted above, a large number of non-OECD States do coordinate on export credit policies but have yet to do so on social issues and human rights. Thus the 2016 recommendation on Common Approaches is currently the key document, which sets out good practice for export credit agencies. As noted above, some non-OECD States take part in meetings of the environmental and social practitioners, with an eye to aligning their processes with the Common Approaches.

68. As the Common Approaches only apply to exports for medium- and long-term export credits with a repayment term of two years or more, a variety of export credit financing, insurance and guarantees provided by export credit agencies are not subject to their application. As noted above, there are examples of export credit agencies applying the Common Approaches and hence human rights due diligence across all their product lines, as in the case of the Dutch, but this is still an exception. A key issue is therefore how to extend the role of human rights due diligence across a broader spectrum of products and services.

69. A second issue is which criteria are applied when human rights due diligence is conducted. The Common Approaches default to the IFC Performance Standards, which are not identical to the Guiding Principles. Again, as noted above, some export credit agencies have supplemented their due diligence processes when they needed to address other human rights scenarios, as was the case with Sweden in the telecommunications sector.

70. The Dutch National Contact Point indicated that for Atradius there needed to be a clearer explanation of the gaps in alignment between the Guiding Principles and the Common Approaches. For example, the scope of human rights due diligence is not limited under the Guiding Principles, whereas the Common Approaches apply only to transactions longer than two years.<sup>51</sup>

71. Another area where improvement is needed relates to the transparency of decision-making at export credit agencies. Civil society groups have been critical of them because they do not share the results of their screening with civil society, affected communities and other stakeholders. A recent study of seven Central and Eastern European export credit agencies, also pointed out that greater transparency was needed.<sup>52</sup>

72. The Common Approaches address the disclosure of information. They include recommendations for public information disclosure as follows: (a) limited project information, including environmental and social impact information, in the case of category A projects, to be made available as early as possible in the review process and at least 30 calendar days before a final commitment to grant official support and (b) environmental

<sup>51</sup> See Both Ends, "Gaps between the Common Approaches and the OECD Guidelines" (June 2016) and CORE Coalition and Amnesty International UK joint submission to the United Nations Working Group on Business and Human Rights.

<sup>52</sup> Finance and Trade Watch and CEE Bankwatch Network "FCAs Go to Market. A Critical Review of Transparency and Sustainability at Seven Export Credit Agencies in Central and Eastern Europe" (December 2017).

and social information on projects classified in categories A and B at least annually after a final commitment to provide support.<sup>53</sup>

73. In exceptional cases, the Common Approaches allow for the information for category A projects, referred to in paragraph 71, not to be disclosed. In those cases, export credit agencies are only required to report to the OECD Export Credit Group. As category A and B projects cover only a small part of the total portfolio of projects supported by export credit agencies, civil society groups have criticized the Common Approaches for lack of transparency across product lines.

74. Based on the mediation which took place between Atradius and two civil society groups before the Dutch national Contact Point, Atradius agreed to change its information disclosure policy in order to be more transparent, as required under the Guiding Principles. The final statement of the National Contact Point indicates that Atradius and the Ministry of Finance agreed to develop a more specific information disclosure policy that starts from the assumption that relevant information should be public, unless specific clearly defined considerations bar such disclosure (as in the case of confidential business information). Atradius agreed to improve the ex-post publication of information on all project categories (A, B, C, M and E), for example by disclosing the nature of the product for each relevant transaction. For category A projects, including transactions with a repayment period of less than two years, an adequate summary of the transaction and the framework of the assessment will be published.<sup>54</sup>

75. Because of the national contact point decision, Atradius took the step of crafting a new environmental and social policy, effective in 2018, that will presumably, among other changes, make more information public, with limited exceptions. It asked Shift, a non-profit organization, to review its prior policies and procedures. The review explored the extent of the alignment of its policies and processes with the Guiding Principles and what changes would be needed to create greater alignment. The report done by Shift recognizes that Atradius goes beyond some of those requirements in practice, but that the Guiding Principles expect even more when it comes to transparency. The authors found that the environmental and social policy framework of Atradius did not articulate a broad approach that recognized the potential value to the business that greater transparency and communication could play. As a result, public disclosure was positioned more as a burden, where the company must meet very narrow and specific requirements, rather than as an opportunity.<sup>55</sup>

### C. Moving beyond the OECD export credit agencies

76. A larger issue is whether other forums can provide platforms for discussion of State responsibilities with respect to environmental and social considerations, including human rights. The OECD Common Approaches are evidence of the value of multilateral harmonization to avoid a race-to-the-bottom approach to human rights and business. However, while the Common Approaches are an important precedent, export financing is no longer an activity carried out exclusively by OECD member States. As of 2013, 44 per cent of global official export support came from export credit agencies outside OECD, including Brazil, China, India and the Russian Federation. As a result, the BRICS Forum could play an important role in aligning State duties under pillar I of the Guiding Principles in the area of export credit. The Berne Union could provide another vehicle for such dialogues, as could the International Working Group on Export Credits.

77. The European Union is yet another forum where export credit agencies could better align their practices with the Guiding Principles. The European Union export credit agency regulation refers to the obligation of member States to comply with the Union's general

<sup>53</sup> See OECD Council recommendation on common approaches for officially supported export credits and environmental and social due diligence (2016), section VII.

<sup>54</sup> See final statement notification Both ENDS- Fórum Suape vs Atradius DSB (30 November 2016).

<sup>55</sup> See Shift, "Integrating human rights due diligence: a review of Atradius DSB's environmental and social policy and procedure".

provisions on external action, such as consolidating democracy and respect for human rights, when establishing, developing and implementing their national export credit systems and when carrying out their supervision of officially supported export credit activities.<sup>56</sup>

#### **D. Export credit agencies and access to remedy**

78. Current National Action Plans do not include discussions of the ways in which export credit agencies address and enable access to remedy by rights holders who are harmed in connection with a project or transaction funded or supported by an export credit agency. As a result, civil society groups have recommended that export credit agencies make it easier for rights holders to know about and access relevant complaint mechanisms.<sup>57</sup> There are several possible options. One would be to have a grievance or complaint mechanism at the export credit agency itself and a second would be to require clients who receive export credit to have an effective grievance mechanism, as outlined in Guiding Principle 31. Finally, export credit agencies should use their screening, assessment, support and leverage roles to strengthen their client-level mechanisms and outcomes for people.

79. In 2011, the Global Alliance of National Human Rights Institutions submitted comments when OECD first revised its common approaches to address the Guiding Principles. At that time, the Global Alliance called for OECD to include explicit requirements regarding access to remedy for company-related human rights abuses, including through the provision of grievance mechanisms at the project level and at the national or export credit agency level that would be accessible to individuals and communities affected by projects.<sup>58</sup> Although the 2016 revision of the Common Approaches does request that export credit agencies consider measures to prevent, minimize, mitigate or remedy potential adverse environmental and social impacts, it is silent on the issue of complaints and grievance mechanisms. The issue of how export credit agencies can use their leverage to enable effective remedies has not been actively explored to date and deserves significant attention.

#### **E. Relationship between the human rights record of a company and future support by the State**

80. The Common Approaches specify that export credit agencies “should where appropriate ... consider any statements or reports made publicly available by their National Contact Points (NCPs) after a specific instance procedure under the OECD Guidelines for Multinational Enterprises”.<sup>59</sup> States that have committed to imposing trade and investment-related consequences for businesses refusing to participate in the national contact point process include Canada, Germany and the Netherlands.

81. For example, Canada has adopted an integrated approach to economic diplomacy as part of its enhanced corporate responsibility strategy for the extractive sector, which was launched in 2014. A key component of that approach is making government support in foreign markets conditional on a company’s good faith participation in the two voluntary dispute resolution mechanisms, namely the Office of the Extractive Sector Corporate Social Responsibility Counsellor and Canada’s national contact point. In 2015, that approach led to the withdrawal of Canadian trade commissioner services from China Gold International

<sup>56</sup> Regulation 1233/2011 of the European Parliament and of the Council of 16 November 2011.

<sup>57</sup> See Finance and Trade Watch, and CEE Bankwatch Network “*ECAs Go to Market*”. The authors recommend that each export credit agency needs to have an independent complaints mechanism with clearly defined procedures and that they formulate and adopt information disclosure and public participation measures.

<sup>58</sup> See [www.business-humanrights.org/sites/default/files/media/documents/icc-submission-to-oecd-export-credits-dec-2011.pdf](http://www.business-humanrights.org/sites/default/files/media/documents/icc-submission-to-oecd-export-credits-dec-2011.pdf).

<sup>59</sup> OECD Council recommendation on common approaches (2016), para. 16.

Resources after it refused to engage with the National Contact Point when a complaint was brought against it.<sup>60</sup>

82. The German National Action Plan also recognizes the need for linking the decisions of the National Contact Point to support in trade promotion. It includes a proposed measure that the National Contact Point be upgraded to a central complaints mechanism for projects relating to foreign trade promotion. The Plan also created a link between business participation in a specific instance procedure and the grant of export credit guarantees, providing an additional incentive for a company to participate in mediation. The Dutch National Contact Point has also committed to applying consequences to businesses that refuse to participate in its process, a commitment that will be tested for the first time in an ongoing case.

83. Three States (Germany, Switzerland and the United Kingdom) reference the linkage between national contact point procedures and export finance in their National Action Plans, although with a nuance regarding the outcome of the case versus good faith engagement by the company in the process. For example, UK Export Finance will consider any reports made publicly available by the National Contact Point in respect of the human rights record of a company when considering a project for export credit.

84. While some export credit agencies, such as that of Japan, indicate that national contact point reports (or other credible findings) will be factored into export credit decisions, to date it is unclear how or when this has happened, apart from the one example in Canada cited above. Other States should follow suit in terms of linking national contact point and other remedial processes to whether a company continues to receive trade support. In combating corruption, a company will often lose its right to participate in government procurement exercises because of a determination that it was engaged in bribery and a similar approach should be explored in relation to human rights-related complaints.

#### **IV. Import and export restrictions to prevent trade in goods with links to human rights abuses**

85. States are using restrictions on exports and imports as a means of ensuring greater corporate respect for human rights. This takes the form of export/import restrictions on certain types of goods that are linked to human rights violations in global supply chains.

86. One example is the Alliance for Torture-Free Trade, an initiative of Argentina, the European Union and Mongolia bringing together countries from around the world. Its aim is to end the trade in goods used to carry out the death penalty and torture. The countries of the Alliance commit themselves to taking measures to control and restrict exports of such products.

87. The European Union has drafted a regulation that will add certain cybersurveillance tools to the list of goods and technologies that need to be approved prior to export. The draft regulation introduces the new concept of "human security" to export controls, to prevent the human rights violations associated with certain cybersurveillance technologies. The proposal mirrors amendments to the German Foreign Trade and Payments Ordinance in 2015, which made companies that sell surveillance products subject to new mandatory export licence requirements to prevent misuse of surveillance technologies for internal repression.<sup>61</sup>

88. In 2016, via the Trade Facilitation and Trade Enforcement Act, the United States Congress closed a loophole in section 307 of the Tariff Act of 1930, which barred products made by convict, forced or indentured labour. Until now, the law has exempted goods

<sup>60</sup> See OECD Watch, "Remedy remains rare: an analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct", p. 46.

<sup>61</sup> See European Parliamentary Research Service briefing, available at [www.europarl.europa.eu/RegData/etudes/BRIE/2016/589832/EPRS\\_BRI%282016%29589832\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/589832/EPRS_BRI%282016%29589832_EN.pdf).

derived from slavery if American domestic production could not meet demand. Section 307 prohibits the importation of merchandise mined, produced or manufactured, wholly or in part, in any foreign country by forced or indentured child labour.<sup>62</sup>

89. Since 2016, U.S. Customs and Border Protection has issued four orders to seize 50 shipments of goods suspected to have been made with forced labour. There were no seizures between 2001 and 2015. On 2 August 2017, Congress passed the Countering Americas Adversaries through Sanctions Act, which contains a provision affecting the entry of merchandise with a nexus to forced labour by North Korean nationals. Since then, there have been 15 seizures of merchandise believed to have been made using North Korean forced labour.<sup>63</sup>

90. There are other examples of States linking import and export licensing and customs clearance to human rights issues. Trade in conflict minerals, illegal logging and conflict timber, and endangered species are other areas where States have acted to restrict the flow of goods that are associated with higher risks of human rights abuses.<sup>64</sup> Companies involved with global supply chains in relevant sectors must engage in human rights due diligence and impact assessments to comply with import and export restrictions. As such, the use of export and import controls is another useful tool that allows States to implement their duty to protect under pillar I of the Guiding Principles.

## V. Conclusions and recommendations

### A. Conclusions

91. Many States have established export and trade promotion services as part of their economic development strategies to promote export-driven growth. At the same time, trade and exports and imports of goods in global supply chains can have significant adverse human rights impacts.

92. Guiding Principle 4 of the Guiding Principles on Business and Human Rights reminds States that their duty to protect rights holders from corporate human rights abuses includes a responsibility to condition public support for trade and investment promotion, such as export credits, on corporate respect for human rights. In addition to export credits, there are a range of additional services that States provide to companies that desire to export, including participation in trade missions, trade advocacy, general guidance on exporting into foreign markets, embassy services in overseas markets, and training and other resources.

93. To date, very little has been done in terms of States fulfilling their obligation under Guiding Principle 4. One area where progress is being made is with respect to the training of trade and embassy personnel on the Guiding Principles. Some States are also providing toolkits and guidance to help businesses address human rights due diligence in their cross-border trade.

94. There remains much to be done in terms of States aligning their trade promotion with the Guiding Principles and promoting a race to the top. States have done more in the way of tying trade support to commitments from businesses not to engage in bribery and to act with integrity. Where States already screen companies for trade promotion or require an integrity or no-bribery pledge, such commitments should be expanded to encompass a commitment to respect human rights.

95. In the area of export credits, with the exception of a few OECD-based export credit agencies, most State-supported or public export credit agencies currently appear not to be actively using the Guiding Principles as part of their decision-making

<sup>62</sup> See, for example, [www.cbp.gov/trade/trade-community/programs-outreach/convict-importations](http://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations).

<sup>63</sup> See [www.cbp.gov/newsroom/blogs/tflea-two-years-and-counting](http://www.cbp.gov/newsroom/blogs/tflea-two-years-and-counting).

<sup>64</sup> See Oli Brown and others, eds., *Trade, Aid and Security: an Agenda for Peace and Development* (London, Earthscan, 2007).

on whether to extend financial support for export activities. The updated 2016 OECD recommendation on common approaches to export credit includes a requirement for export credit agencies to require applicants to undertake some form of human right due diligence with respect to projects that pose severe human rights risks.

96. While this is a positive step, to date, there are still only limited examples of good practice even among the States which are members of the OECD Export Credit Group. Furthermore, as noted in the present report, the Common Approaches still have limitations in terms of the transactions to which they apply and the fact that they leave questions over transactions that are not covered, as well as issues of access to remedy and information disclosure. Furthermore, the OECD Export Credit Group represents only a subset of the larger set of global export credit agencies.

97. As the report indicates, there is room for reform in the export credit area as part of State commitments under Guiding Principle 4. While States may commit to factoring reports from national contact points and other types of determinations into export credit agency decision-making, at present there is scant evidence that States have refused to grant trade or export credit support to applicants because of an adverse human rights determination.

98. Finally, export and import controls and restrictions seem to be a promising avenue for States to cause businesses that engage in cross-border trade to engage in stronger human rights due diligence — either as buyers or sellers. In the event that States take active measures to prevent goods such as those made with forced labour from entering markets, this does provide a strong incentive for businesses to focus on the Guiding Principles and human rights due diligence.

## **B. Recommendations**

99. States should require businesses to demonstrate an awareness of and commitment to the Guiding Principles as a prerequisite for receiving State support and benefits relating to trade and export promotion. States should condition participation in trade missions, eligibility for trade advocacy and generalized export assistance on such commitments. Such forums and tools should be used to raise awareness of business-related human rights risks in the relevant contexts, with a particular emphasis on the risks faced by vulnerable groups and individuals. The situation for human rights defenders and trade unions should serve as a concrete benchmark.

100. States should look to see where they have required businesses to make existing integrity and anti-corruption pledges in the context of trade promotion and expand such commitments to include a commitment to respect for human rights and an alignment of business activities with the Guiding Principles.

101. States should examine how and when they have withdrawn trade or other government support from companies in the event that they are found to have engaged in foreign bribery or corruption, and determine how a similar withdrawal of support could be structured in the event that businesses have been found to have caused or contributed or been directly linked to adverse human right impacts.

102. States should also examine how to use withdrawal of trade support more actively, so as to create incentives for companies to respect human rights and engage in human rights due diligence and legitimate remediation processes. To the extent that companies know that there is a risk of losing export financing and other benefits, that may promote greater compliance with the Guiding Principles.

103. In terms of export credit, States and their export credit agencies should ensure that their practices are aligned with the Guiding Principles, not just the IFC Performance Standards. For participants in the OECD Export Credit Group, States are encouraged to look beyond the four corners of the OECD Common Approaches, to see how better to align export credit activity with the Guiding Principles. That is particularly true for transactions that fall outside the scope of the Common

Approaches (for example, short-term transactions, working capital or support for bonds). Similarly, export credit agencies should develop useful models of human rights screening and due diligence that relate to transactions that may not clearly fall under the current definition of "project" (for example, the sale of mobile equipment such as ships or communications equipment).

104. States should consider using many of the multilateral forums that exist for export credit agencies to engage in developing good practices and further commitments relating to the Guiding Principles. Such forums include the Berne Union, the International Working Group on Export Credits, the European Union and the BRICS Export Credit Forum.

105. Export credit agencies should focus much more on the issue of enabling access to remedy. That includes developing better practices for evaluating, supporting and incentivizing the quality of the grievance mechanisms of their clients/applicants at the operational level. At the same time, export credit agencies also need to ensure that they have effective complaints mechanisms and that such mechanisms are readily accessible by affected parties, rights holders and communities. That is an area where the OECD Common Approaches are silent.

106. Export credit agencies should review their current transparency and disclosure policies and consider revising them to make more information public. Following the example of the Netherlands, export credit agencies can begin from a presumption that material is made public and then carve out narrow exemptions. There may also be a way to present some data in aggregate form or to redact confidential information but still provide civil society with key facts about both successful applications and those turned down by an export credit agency.

107. States are encouraged to further develop innovative measures to prevent trade in goods that are connected to serious human rights risk in global supply chains.

108. While the present recommendations are focused primarily on States, civil society groups are encouraged to continue their advocacy around issues of human rights, export credits and trade promotion, and to seek greater alignment of State policies and regulations with the Guiding Principles. Similarly, businesses are encouraged to work in partnership with trade promotion entities to develop and disseminate effective guidance on how business respect for human rights can be demonstrated in cross-border trade.

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